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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. [redacted] 118

PAUL GINSBURG, Petitioner

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg, petitioner, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Third Circuit to review its judgments dated and entered February 17, 1959 (App. 2 and App. 5).

OPINIONS BELOW

A. The Order of the United States District Court for the Western District of Pennsylvania, which was the subject of appeal No. 12764, was not accompanied by an Opinion and the case is not reported. The Opinion of the United States Court of Appeals for the Third Cir-

cuit is reported in 263 F.2d 457, and is appended hereto (App. 1-2). The same action was previously before this Honorable Court on petition for writ of certiorari at No. 834 October Term, 1957, and the proceedings and appendices therein are incorporated herein by reference thereto. In the prior appeal, the Order of the United States District Court for the Western District of Pennsylvania was accompanied by an Opinion and the case is reported in 148 F. Supp. 663; and the Opinion of the United States Court of Appeals for the Third Circuit is reported in 251 F.2d 49.

B. The Order of the United States District Court for the Western District of Pennsylvania, which was the subject of appeal No. 12765, was not accompanied by an Opinion and the case is not reported. The Opinion of the United States Court of Appeals for the Third Circuit is reported in 263 F.2d 458, and is appended hereto (App. 3-5). This same action was previously before the United States Court of Appeals for the Third Circuit on two prior appeals. The Order of the United States District Court for the Western District of Pennsylvania, which was the subject of the first appeal at No. 11499, was accompanied by an Opinion and the case is reported in 125 F. Supp. 596; and the Opinion of the United States Court of Appeals for the Third Circuit is reported in 225 F.2d 245. The Order of the United States District Court for the Western District of Pennsylvania, which was the subject of the second appeal at No. 12052, was accompanied by an Opinion and the case is reported in 19 F.R.D. 238; and the Opinion of the United States Court of Appeals for the Third Circuit is reported in 242 F.2d 379.

JURISDICTION

The judgments sought to be reviewed (App. 2 and App. 5) were dated and entered February 17, 1959.

The Orders of the Court of Appeals denying the Petitions for Rehearing were dated and entered March 16, 1959. Therefore, the time for filing this petition for writ of certiorari expires June 15, 1959.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., Section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

When a Complaint in Federal Court asserts damages against members of the State judiciary acting in official capacity; with jurisdiction based on the Constitution of the United States, the Civil Rights Acts, and a sum in excess of the jurisdictional amount exclusive of interest and costs; and alleges deprivations by the defendants discriminatorily, arbitrarily and illegally, of plaintiff's federal property, constitutional and civil rights; do not Orders of Court conflict with the Law of the Land and illegally deprive the plaintiff-appellant of his right to due process of law as guaranteed by the Constitution of the United States, when such orders hold that:

(A) the Complaint fails to state a claim upon which relief can be granted;

(B) the defendants are immune from suit;

(C) the plaintiff does not have the right to discovery under Rule 26(a);

(D) the defendants' failure to plead the affirmative defense of immunity under Rule 8(c), did not waive the right to plead it pursuant to Rule 12(h);

(E) the plaintiff cannot have his right, prior to service of a responsive pleading, to amend once as a matter of course under Rule 15(a), without leave of court or consent of the defendants;

(F) the Exhibit to a Complaint, which is evidently relevant, material, pertinent thereto and free of scandal, can summarily be suppressed and impounded, and even when the alleged scandal does not refer to the moving defendants;

(G) the mandate of the Court of Appeals prevents further proceedings in the District Court, which proceedings are allowable under the Federal Rules of Civil Procedure and the applicable law, even on issues and matters that are not within the compass of the mandate, in the course of which proceedings, defendants' attachment execution for costs is allowable against plaintiff's property;

(H) the jurisdiction of the Court of Appeals is not exclusively appellate, and it can usurp the power and assume the function of the District Court whimsically and capriciously, particularly by "reviewing" issues which were not adjudicated by the District Court;

(I) a case can volley back and forth between the District Court and the Court of Appeals with the result that the case is preliminarily dismissed on unsupported and insupportable motion in advance of plaintiff's right to be heard, without a true adjudication of any of the issues involved?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States involved herein are the Fifth and Fourteenth Amendments, the pertinent portions of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172 and Amendment 14, p. 2), are as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . .".

"Amendment XIV. Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws".

STATUTES INVOLVED

The statues involved herein are known as the Civil Rights Acts. The particular statute involved is derived from the Act of April 20, 1871, C. 22, sec. 1, 17 Stat. 13, sec. 1983 of Title 42 of the United States Code, now R.S. Section 1979, the pertinent portion of which is as follows:

"Civil Action for Deprivation of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

STATEMENT OF THE CASE

The petitioner, Paul Ginsburg, is a citizen by birth and a practicing lawyer of Pittsburgh, Pennsylvania; a member in good standing of the Bar of State and Federal Courts in Pennsylvania and of this Honorable Court; and a member in good standing of The Allegheny County Bar Association (and past Officer thereof), the Pennsylvania State and American Bar Associations.

Petitioner instituted two suits in the District Court for damages against the respondents individually and jointly as Justices of the Supreme Court of Pennsylvania. Jurisdiction of the suits was based on the Fourteenth Amendment to the Constitution of the United States, the Civil Rights Acts, and a sum in excess of the jurisdictional amount exclusive of interest and costs. Alleged are deprivations by the defendants discriminatorily, arbitrarily and illegally, of plaintiff's federal property, constitutional and civil rights.

Although your petitioner contends that the actions of the respondents in the State Court, which impelled the petitioner to bring the instant suits, were illegal, that is not at all in issue herein. *The point is that regardless of the legality or illegality of their actions, they had the effect of depriving and did deprive petitioner of federal constitutional and civil rights. It is those deprivations which are the subject of these suits, as alleged.*

A. In the case involving the one judgment to be reviewed (App. 2), Appeal No. 12764, that action was filed in the District Court at No. 14240 and was previously before this Court at No. 834 October Term, 1957, and all of the proceedings and appendices therein are

incorporated herein by reference thereto. The statement of the case therein (Petition, pp. 5-9), incorporated herein, gives the background of the action and details the pleadings, repetition of which is unnecessary because the hereinabove second paragraph of the instant Statement of the Case makes it manifest that under Notice Pleadings the Complaint is sufficient.

On June 23, 1958, the date of the denial of the last pleading filed in said prior certiorari proceeding, your petitioner lodged in the District Court his motion to vacate the Order dismissing the Complaint and for other relief (R. 6a-8a), to which there was an Answer (R. 9a), followed by a Reply (R. 10a-11a).

The said motion contained authorities on every point in support thereof. The said answer failed to deny any averments of the motion. The said reply showed that the Court had no legal alternative but to grant the motion. Nonetheless the District Court entered an Order (R. 11a) denying the motion.

The denied motion was founded on sound legal propositions. Its *first averment* showed that District Judge McIlvaine's Order of December 18, 1956, granting defendants' Motion to Dismiss Under Rule 12, was based solely on the ground that "the doctrine of judicial immunity from suits irrespective of the Civil Rights Act" is a complete defense to the instant action; and that the said Order was erroneous because the District Judge was powerless to grant the said defense that had been waived by the defendants, and, regardless, the defendants do not have immunity. The *second averment* showed that, on appeal, the Order was affirmed, but on a different ground, in effect reversing

the holding of immunity. The affirmance was based upon failure of the Complaint to state a claim on which relief could be granted aside from immunity, an issue which was not properly before the Court of Appeals for review and which it was without jurisdiction to adjudicate, because there had not been an adjudication in the District Court on that issue. The *third averment* showed that denial of certiorari did not imply approval of the decisions below or the supporting opinions, and that now the plaintiff is entitled to a Hearing in the District Court on the issue of whether the Complaint states a claim upon which relief can be granted.

On appeal from the Order denying the said motion, the Court of Appeals affirmed (App. 2), "under the principle stated in *Butcher & Sherrerd v. Welsh*, 206 F. 2d 259, 262 (3rd Cir. 1953)" (App. 2). But that case is not applicable herein, except to dispel the erroneous notion below that there can be only one appeal or one mandate to a case, because that was a mandamus proceeding to vacate an order granting a new trial and further proceedings *after the Court of Appeals had returned three mandates affirming judgment against the defendant.* Incidentally, the subject of each mandate therein was the same, and each involved an issue over which that *reviewing court* had jurisdiction. The Petition for Rehearing (pp. 3-4) cited authorities which exposed the ostrich-like applicability of *Butcher & Sherrerd v. Welsh,* and revealed the conflicting arbitrariness of the discriminatory affirmance. Hence this petition.

B. In the case involving the other judgment to be reviewed (App. 5), Appeal No. 12765, that action was

then before the Court of Appeals for the third time. It was filed in the District Court at No. 12643, and was first appealed to the Court of Appeals at No. 11499 from an Order of dismissal entered by Chief District Judge Gourley. Although said Order included refusal of a motion to strike the appendix to the Complaint, the Court of Appeals preliminarily granted such motion to strike and suppress erroneously. After affirmance by the Court of Appeals, petitioner sought leave therein to file an Amended Complaint, which was denied.

After the foregoing and other proceedings in that appeal, your petitioner presented in the District Court a Motion for Leave to File Amended Complaint. In the original Complaint the only defendants named were the then Chief Justice of the Supreme Court of Pennsylvania (Horace Stern) and the Prothonotary (Patrick N. Bolsinger) of that Court's Western District. The Amended Complaint named Horace Stern, Charles Alvin Jones, John C. Bell, Jr., Thomas McKeen Chidsey, Michael A. Musmanno and John C. Arnold as defendants, individually and jointly as Justices of the Supreme Court of Pennsylvania. That is why, having added the other Justices as defendants and dropped Bolsinger, the instant petition for certiorari is so captioned.

Pursuant to Rule 15(a), petitioner had the absolute right to have the Amended Complaint filed without leave of Court, but the Clerk had refused to file it. Nevertheless, Chief Judge Gourley refused to order the Amended Complaint filed solely for the reason that the defendants were immune from suit. He specifically held, however, that except for the question of immunity, the amended

complaint states a claim upon which relief can be granted, and particularized this holding upon clarification. On appeal from Hon. Wallace S. Gourley's Order refusing leave to file the amended complaint at No. 12052, the Court of Appeals affirmed.

After that second appeal your petitioner had the right to proceed further in this Honorable Court under 28 U.S.C., secs. 1254 (1) or 1651(a), or back in the District Court. However, he and counsel for the defendants agreed to await the determination of the other case referred to in section A of this Statement, between the same parties and involving the same issue of lack of immunity. Yet, while the other action was still pending and undetermined, the defendants proceeded *ex parte*, on August 13, 1958, with a Praecipe for Writ of Attachment Execution (R. 8a), and had the U. S. Marshal serve a Writ of Attachment Execution for $335.30 (R. 9a) and Interrogatories to Garnishee (R. 10a) upon the Mellon National Bank and Trust Company, as a result of which the bank blocked one of petitioner's bank accounts in the sum of $500.00 as is evident from the Answers to Interrogatories (R. 11a-12a). Not only did the defendants fail to give petitioner notice of taxing any costs, but they have never attempted to establish that their costs amount to $335.30 or any other amount.

On August 26, 1958, three documents were filed for plaintiff in the District Court: (1) Notice of Taking Deposition (R. 13a) of defendant Horace Stern, and defendants made a motion that it be not taken (R. 14a-15a); (2) Motion to Vacate Order Refusing Motion for Leave to File Amended Complaint and for Other Relief

(R. 15a-16a), to which defendants made Answer (R. 17a-18a); and (3) Motion to Vacate Writ of Attachment Execution and to Dissolve Attachment (R. 19a-20a), to which defendants made Answer (R. 20a-21a). Chief District Judge Gourley entered three orders (R. 22a) unaccompanied by an Opinion on September 29, 1958, adjudicating all issues adversely to plaintiff, from which the third appeal was taken at No. 12765.

The Court of Appeals affirmed (App. 5), as in the other judgment sought to be reviewed herein: "Since the order of July 19, 1956, denying plaintiff leave to amend was affirmed by this Court in 242 F. 2d 379 and a mandate thereon had issued, the district court properly refused to vacate the July 19, 1956, order under the principle stated in *Butcher & Sherrerd v. Welsh,* 206 F. 2d 259, 262 (3d Cir. 1953). In the circumstances the district court was right in refusing to vacate the writ of attachment for costs and in preventing plaintiff from proceeding to take the noticed deposition" (App. 5).

The denied Petition for Rehearing reveals that the misguided blindness of the illegal obedience to "the principle" stated in *Butcher & Sherrerd v. Welsh,* is exceeded only by the preposterous reverence for the sanctity of a pierced mandate. Hence this petition.

REASONS FOR ALLOWANCE OF THE WRIT

On May 18, 1959, the opinions of this Honorable Court were entered in the case of *Dick, Petitioner, v. New York Life Insurance Co.*, 79 S. Ct. 921, *which opinions chart the certiorari course.* Mr. Chief Justice Warren delivered the opinion of the Court, and Mr. Justice Frankfurter the dissenting opinion. **For purposes herein it does not matter which opinion is the correct one in that case, because both opinions support petitioner's right to certiorari in this case.**

Both the Evarts Act and the "Judges' Bill", cited in Mr. Justice Frankfurter's dissent, even authorize and attest the ned for review of the judgments in the instant cases in order, *inter alia*, to secure and preserve uniformity of decision.

A. The Complaints Are Sufficient.

It is elementary that on a Motion to Dismiss, all allegations of the Complaint must be taken as admitted to be true and all inferences therefrom must be construed most favorably towards the plaintiff's case. In the case of *Publicity Building Realty Corp., et al., v. Hannegan, et al.*, 139 F. 2d 583, the Court stated (p. 586): "This Court has repeatedly said that a motion to dismiss a complaint should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim"; and (p. 587): "An attempt by this Court to rule upon these issues of law, which have not been tried below, and which require the assumption of a factual situation as favorable to the appellants as can reasonably be conceived in view of

their pleadings, would not be justified". Since jurisdiction herein is based upon the Fourteenth Amendment and the Civil Rights Acts, no Court under Notice Pleadings can legally presume to declare that the plaintiff has not alleged a deprivation of every right guaranteed by the Fourteenth Amendment and the Civil Rights Acts.

It is obvious that the Complaint in the one case and the Amended Complaint in the other case both fully comply with Rule 8(a) *Claims for Relief,* which provides that "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled". Therefore, pursuant to Notice Pleadings, there cannot be any legal denial of sufficiency.

Have Not The Lower Courts Erroneously Concluded That Petitioner Has No Federal Constitutional And Civil Rights?

The numerous rights of which petitioner has been conspiratorily, discriminatorily and illegally deprived by respondents include, but are not limited to, his right to earn a living and secure compensation earned for services rendered in his chosen profession, the right to protect and enforce the said rights in accordance with established forms of law and procedure and with due process of law, the right to secure and protect his property including his business and profession, the right to a day in Court and to be heard in advance of judgment, the right to protect and defend his personal and professional

standing. These rights are common to all, not peculiar to petitioner; and they are guaranteed. *Wilson, Inc. v. F.C.C.*, 170 F. 2d 793 (1948); *Sorenson v. Jacobson*, 232 P. 2d 332 (1951); *Carroll v. Local No. 269 I.B.E.W.*, 31 A.2d 223 (1943); *Lasdon v. Hallihan*, 36 NE 2d 227 (1941); *People v. Love*, 298 Ill. 304; *Ackerman v. U.S.*, C.A. Tex. (1949), 178 F. 2d 983, opinion followed in 179 F. 2d 236, judgment affirmed 71 S. Ct. 209, 340 U.S. 193, 95 L. Ed. 207; *Hanson v. Union Pac. R. Co.*, 71 N. W. 2d 526 (1955); *Bomar v. Keyes*, 162 F. 2d 136 (1947), certiorari denied 332 U.S. 825, rehearing denied 332 U.S. 845.

B. The Respondents Do Not Have Immunity.

Under the law of the instant Circuit and the Law of the Land, the respondents do not have immunity herein. *Picking v. Pa. R. Co.*, 151 F. 2d 240 (1945), cited with approval in *McShane v. Moldovan*, 172 F. 2d 1016 (1949), in *Cooper v. Hutchinson*, 184 F. 2d 119 (1950) and in *Tenney v. Brandhove*, 341 U.S. 367 (1951). This law has, of course, been upheld in the most recent pronouncement of this Honorable Court in *Cooper, et al., v. Aaron, et al.*, 358 U.S. 1 (1958). *Cooper v. Hutchinson, supra*, also cited with approval *Valle v. Stengel*, 176 F. 2d 697 (1949). *McShane v. Moldovan, supra*, relies upon *Screws v. United States*, 325 U.S. 108, reaffirming *United States v. Classic*, 313 U.S. 299, all of which leave no doubt about the lack of immunity. Incidentally, in *Cooper v. Hutchinson, supra*, Circuit Judge Goodrich of the Court of Appeals stated (p. 124): "But appellants say that their right to assert a claim under Section 1 of the Civil Rights Act of 1871 is not dependent upon the prior pursuit of relief under state law. That is

correct. *Lane v. Wilson*, 1939, 307 U.S. 268, 274-275, 59 S. Ct. 872, 83 L. Ed. 1281. We are not here governed by the rule of the habeas corpus cases to the effect that the state law processes must be exhausted before there can be resort to a federal court".

Actually, the dismissal in both cases was solely on the ground of immunity. District Judge John W. McIlvaine refused to consider any of the motions properly before him in the action on appeal at No. 12764, because of his personal opinion on immunity. Chief District Judge Wallace L. Gourley held that the Amended Complaint in the action on appeal at No. 12765 stated a claim on which relief can be granted aside from the question of immunity, yet holding that the actions of the defendants were "violative of basic concepts of justice". Because of the refusal of the Court of Appeals to make a single affirmance on the ground of immunity, having expressly refrained from adjudicating that lone issue before it on the prior appeals, has it not in effect reversed the dismissals on the ground of immunity and then gone on to "adjudicate" matters not procedurally before it?

Therefore, as a matter of law, the respondents must necessarily find themselves in the distressing position, where they must be returned to the District Court without immunity and subject to Complaints that state claims on which relief can be granted; where they must face the facts, under the Constitution and laws, with no more technical escapes from their liabilities imposed by law.

C. The Decisions Denying Petitioner His Right To Discovery Were Erroneous.

It is elementary that a plaintiff is entitled to take depositions under Rule 26(a) for purposes of discovery. This right is fundamental. How then can the District Judges justify their consideration of motions to dismiss, let alone their granting them, in advance of the exercise of plaintiff's right to take depositions? How then can the Court of Appeals justify its sanctioning of such departures from the accepted and usual course of judicial proceedings?

D. The Respondents Waived The Right To The Affirmative Defense of Immunity.

By their failure to plead the affirmative defense of immunity under Rule 8(c), the respondents in both cases have waived it pursuant to Rule 12(h). In the case of *Van Sant v. American Express Co.*, 169 F. 2d 355 (1948), the Court of Appeals held that affirmative defenses not pleaded under Rule 8(c) are waived pursuant to Rule 12(h) and then are not subsequently allowable by amendment.

Subdivision (h) of Rule 12 intends that any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been waived. *Phillips v. Baker*, 121 F. 2d 752, 9 CCA (1941), certiorari denied 314 U. S. 688.

E. The Refusal To Permit Petitioner His Right To Amend Under Rule 15(a) Was Clearly Erroneous.

It is apparent from the Record that a responsive pleading has never been served or filed for the defendants. It is elementary that Rule 15 (a) guarantees that a plaintiff may amend once as a matter of right without leave of court or consent of defendants at any time prior to service of a responsive pleading. Therefore, Chief District Judge Gourley was duty bound to order the aforesaid Amended Complaint filed, because District Judges are bound by the Federal Rules of Civil Procedure as by an Act of Congress. *Foltz v. Moore-McCormack Lines, Inc.*, 19 F. R. D. 301 (Cf. 28 U.S.C., sec. 2072).

In *Saper v. Hague*, 186 F. 2d 592, 2 CCA (1951), the Court held that even a motion to conform a pleading to proof may be made at any time, even after judgment. In *Du Pont v. U. S. Camo Corp., et al.*, 19 F.R.D. 495 (1956), W.D. Mo., the Court held that there is no limitation on time to amend, only due diligence being required; and generally leave is granted freely where justice requires and particularly when the amendment is directed to clarification of the issues. In *Copeland v. General Motors Corp.*, 199 F. 2d 566, 5 CCA (1952), the Court held that a party may amend freely to secure a determination on merits rather than on technicalities; and there is no laches where amendment is tendered shortly after awaited decision of issues by the Supreme Court.

F. The Suppression Of The Exhibit To A Complaint By The Court of Appeals Was Unauthorized and Contrary To Applicable Law.

The original Complaint in the action described in section B of the Statement of the Case, contained an Exhibit which Chief District Judge Gourley refused to strike. The said Exhibit was a copy of a Petition presented in the Pennsylvania Supreme Court which then Chief Justice Horace Stern ordered the Prothonotary not to file, and then later ordered said Petition dismissed through an off-the-record Order in that Court of record. The Petition showed that your petitioner was denied the right to prosecute a *prima facie* disbarment Complaint against Attorney Louis Caplan and others, which prosecution in effect constituted petitioner's defense to unwarranted, untrue, defamatory and illegal attacks upon petitioner's personal and professional standing and his property right therein.

The said Exhibit is relevant, material and pertinent to the Complaint and free of any scandalous matter. Nevertheless the Court of Appeals, on motion of defendants who were not respondents therein, ordered it impounded.

G. It Was Error To Deny Petitioner The Right To Proceed On Matters Not Within The Compass Of The Mandates; And To Allow Defendants' Attachment Execution Against Petitioner's Property For Costs, Pending The Proceedings.

In opposition to the "principle" stated in *Butcher & Sherrerd v. Welsh*, the applicable legal authorities establish petitioner's right to have proceeded as he did.

The mandate from the reviewing court is controlling only as to such matters as are within the compass of such mandate, and the lower court is still free to act as to questions not within the compass of the mandate. *Carpenter v. Rohm & Haas Co., Inc.,* 3rd Cir. 1950, 180 F.2d 749, affirming D.C. Del., 9 F.R.D. 535, citing with approval *Maddix v. Dize,* 61 F. Supp. 946. Furthermore, it is not necessary that a preliminary petition be made to the reviewing court to reopen a judgment below which was affirmed on appeal. *Von Wedel v. McGrath,* 3rd Cir. 1952, 194 F.2d 1013, affirming D.C.D. N.J., 100 F. Supp. 434, citing *Perlman v. 322 West Seventy-Second Street Co.,* 2 Cir. 1942, 127 F.2d 716. The Court's affirmance in *Von Wedel v. McGrath, supra,* held also (100 F. Supp. 434, 436) that "where the legal effect of the affirmance is not to be disturbed, a judgment may be reopened (In Re Harbor Stores Corporation, D.C.S.D. N. Y. 1940, 33 F. Supp. 360)", and that "It would seem proper, therefore, to permit an amendment even after dismissal and affirmance on appeal if the circumstances so warrant (*Feuerstein v. Zukor,* 2 Cir. 1949, 174 F.2d 371)".

The misapplication of the case of *Butcher & Sherrerd v. Welsh, supra,* bearing an implication of support for affirmance by the Court of Appeals, is based at best upon a misconstruction of the source of the District Court's power and duty, which actually lies in the Federal Rules of Civil Procedure by which the Judges are bound as by an Act of Congress. *Therefore, a mandate as such cannot delimit, disaffect or change the powers and duties of District Judges.*

The issues sought to be adjudicated were not within the compass of the mandates. When the Court of

Appeals at first *refrained* from adjudicating the issue of lack of immunity, then repeatedly *declined* to adjudicate that issue in both cases, it was simply failing to adjudicate the only issue properly or legally before it in the prior appeals. Actually its adjudications on the issue of sufficiency were and are a legal nullity. Furthermore, the Court's decline and refraint to affirm on the immunity issue in effect constituted a reversal of the District Court. Therefore, the issuance of the mandates could not legally have prohibited the District Court from proceeding with the cases pursuant to the Federal Rules of Civil Procedure.

It is elementary that until an action is finally determined, none of the parties can collect costs, and it is apparent on the record that these cases are pending and undetermined. Nevertheless Chief Judge Gourley allowed defendants' execution attachment against petitioner's bank accounts for costs in the action described in section B of the Statement of the Case, which was sanctioned by the Court of Appeals. The attachment was based on the fictional premise that the action is not pending. Actually, the respondents were asking the lower Courts to overlook and disregard the filing of all pleadings which were filed and subject to consideration; to pretend that the Orders thereon were never really entered; to make believe that the arguments below were not really taking place; and to decline to make decisions which the Judges were bound to enter,—all being utterly fantastic. It is respectfully submitted that this Honorable Court is fully cognizant and aware of the Record before it on review.

H. The Jurisdiction of The Court of Appeals Is Exclusively Appellate.

It is not the function of the Court of Appeals to assume the powers and function of the District Court. The function of the appellate court is limited to considering and rectifying errors of the lower Court. *Ralston Purina Co. v. Novak,* 111 F. 2d 631 (1940). *Stephenson v. Equitable Life Assur. Soc. of U. S.,* 97 F. 2d 406 (1937). See also *N.A.A.C.P. v. Alabama,* 357 U. S. 449, wherein Mr. Justice Harlan (p. 466) stated, "Petitioner has never received a hearing on the merits of the ouster suit, and we do not consider these questions properly here". *It is respectfully submitted that when this Supreme Court recognizes and submits to the limitations upon its reviewing powers, certainly the Court of Appeals should do so.* The issue of sufficiency of the complaints was not properly within the compass of the mandates, and petitioner should not have been denied his constitutional, procedural right to be heard on that issue; *which at any rate is not the subject of review prior to trial.*

Therefore, in the instant cases, the Court of Appeals was powerless to adjudicate any issue except lack of immunity, and thereupon to issue mandates providing only that the cases proceed in the District Court pursuant to the Federal Rules of Civil Procedure.

1. Review and Reversal are Required to Prevent Such Dismissals Without Legal Adjudications.

What has happened in the instant actions, has happened in other cases in the lower Courts,—decision after decision, without a single legal adjudication on procedural and substantive issues that are properly before

the Court. Consequently, just as your petitioner was deprived of due process of law by the respondents in violation of the Fourteenth Amendment, he has been deprived of due process of law in the Courts below in violation of the Fifth Amendment.

The Court of Appeals is supposed to afford a litigant his right to a second chance. But the Record herein makes it self evident that your petitioner never obtained his second chance therein. *Therefore, as an additional ground for certiorari*, it is respectfully submitted that this Court exercise its supervisory power over the lower Courts as a substitute second chance.

CONCLUSION

Judges of the Circuit Courts, so inclined, should be made less confident that they can dispense "justice" as they please, denying litigants a second chance, *without fear of review*. This Court's exercise of its supervisory power could cure that National problem. In order to restrict, if not eliminate this disregard of the honor of the fair administration of justice in the Federal system, this petition for writs of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG

Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,764

PAUL GINSBURG, *Appellant*

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania

Appeal From the United States District Court for the Western District of Pennsylvania.

Argued February 2, 1959

Before GOODRICH and STALEY, *Circuit Judges*, and STEEL, *District Judge*.

OPINION OF THE COURT

PER CURIAM (Filed February 17, 1959)

This is an appeal from an order of the District Court for the Western District of Pennsylvania. The chronology of the case follows.

On February 2, 1956, plaintiff instituted a civil action against the Justices of the Supreme Court of Pennsylvania individually and jointly, charging them with a violation of the Civil Rights Acts, 42 U.S.C.A. §§ 1983, 1985, 1986 (1957). On motion the district court on December 18, 1956, dismissed the complaint, holding that it failed to state a claim upon which relief could be granted, on the ground that defendants, as judges acting in their official capacity, were immune from liability.

148 F. Supp. 663 (W.D. Pa. 1956). During the pendency of plaintiff's appeal from the district court judgment, this Court denied his motion to remand. The judgment of the district court subsequently was affirmed. 251 F.2d 49 (1958). This Court, declining to rule on the immunity point, held nevertheless that plaintiff's complaint failed to state a claim upon which relief could be granted. *Id.* at 50. A petition for rehearing was denied. *Id.* at 49. On April 14, 1958, the Supreme Court denied certiorari, 356 U.S. 932; and on April 21, 1958, this Court's mandate was issued to the district court. Plaintiff's petition for rehearing was denied by the Supreme Court on May 5, 1958, 356 U.S. 954, as was his motion to remand on June 23, 1958, 357 U.S. 924.

On the same date plaintiff filed in the district court a motion to vacate its order dismissing the complaint and for other relief. The plaintiff now appeals from the district court's order denying the motion.

Since the order of December 18, 1956, dismissing the complaint which plaintiff sought to have the district court vacate was affirmed by this Court in 251 F.2d 49 and a mandate of affirmance had been issued thereon, the district court was right in refusing to vacate the order of December 18, 1956, under the principle stated in *Butcher & Sherrerd v. Welsh*, 206 F.2d 259, 262 (3rd Cir. 1953).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,765

PAUL GINSBURG, *Appellant*

v.

HORACE STERN and PATRICK N. BOLINGER

Appeal From the United States District Court for the Western District of Pennsylvania.

Argued February 2, 1959
Before GOODRICH and STALEY, *Circuit Judges*, and STEEL, *District Judge*.

OPINION OF THE COURT

(Filed February 17, 1959)

PER CURIAM

This is an appeal from three orders of the District Court for the Western District of Pennsylvania. The chronology of this case follows.

On August 31, 1954, plaintiff instituted a civil action against the then Chief Justice and the Prothonotary of the Supreme Court of Pennsylvania, charging them with a violation of the Civil Rights Acts, 42 U.S.C.A. §§ 1983, 1985, 1986 (1957). On motion the district court dismissed the complaint, holding that it failed to state a claim upon which relief could be granted, on the ground that the defendants were immune from liability and on the further ground that the complaint failed to disclose the denial to plaintiff of any rights under the Constitution or laws

of the United States or under Pennsylvania law or the Rules of its Supreme Court. 125 F. Supp. 596, 600-03 (W.D. Pa. 1954). This Court, sitting en banc, affirmed on the ground that the plaintiff had "not stated a cause of action cognizable in a United States District Court under the Civil Rights Acts . . . or any other statute or rule of law." 225 F.d 245 (1955). The opinion expressly declined to rule on the immunity ground. *Ibid.* Before issuing its mandate this Court denied a motion to amend the complaint, a petition for rehearing, 225 F.2d 245, and a motion for leave to file a supplementary petition for rehearing. Plaintiff then moved in the district court for leave to file an amended complaint. On July 19, 1956, the district court issued an order refusing to grant leave to amend and entered a judgment. 19 F.R.D. 238 (W.D. Pa. 1956). On appeal this Court affirmed the denial but vacated the district court's judgment, on the ground that the original judgment for the original defendants remained intact. 242 F.2d 379 (1957). A petition for rehearing was denied. *Ibid.*

In both appeals costs were taxed against the plaintiff, in total $315.30. On August 13, 1958, a writ of attachment execution was issued by the defendants for the collection of the costs. Plaintiff then (1) moved to vacate the writ of attachment, (2) moved to vacate the July 19, 1956, order of the district court which had refused his motion for leave to file an amended complaint and (3) gave notice of intention to take the deposition of one of the defendants. After answer, counter-motion and argument the district court by order denied both of plaintiff's motions and refused to permit the taking of the proposed deposition. From these orders the plaintiff now appeals.

Since the order of July 19, 1956, denying plaintiff leave to amend was affirmed by this Court in 242 F.2d 379 and a mandate thereon had issued, the district court properly refused to vacate the July 19, 1956, order under the principle stated in *Butcher & Sherrerd v. Welsh*, 206 F.2d 259, 262 (3d Cir. 1953). In the circumstances the district court was right in refusing to vacate the writ of attachment for costs and in preventing plaintiff from proceeding to take the noticed deposition.

The judgment of the district court will be affirmed. In addition, plaintiff's motion to remand, filed in this Court on January 12, 1959, will be denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 6 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. [redacted]118

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania, and PATRICK N. BOLSINGER.

BRIEF FOR RESPONDENTS, HORACE STERN AND PATRICK N. BOLSINGER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 1003

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania, and PATRICK N. BOLSINGER.

BRIEF FOR RESPONDENTS, HORACE STERN AND PATRICK N. BOLSINGER, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 263 F 2d 458 and is printed at pages 3-5 of the appendix to the petition for certiorari. The opinion of the District Court has not been published, but is printed as an appendix hereto. Prior opinions in this case are reported at 125 F. Supp. 596, 225 F 2d 245, 19 FRD 238 and 242 F 2d 379.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 17, 1959. A petition for rehearing was denied on March 16, 1959. The jurisdiction of this Court is claimed to be invoked under 28 U.S.C. § 1254 (1), and under "the general supervisory power of this Court over lower Federal Courts."

QUESTIONS PRESENTED

1. Whether the rights which petitioner alleges were violated are rights secured to him by the Federal Constitution and laws.

2. Is the question of whether the complaint states a good cause of action now *res judicata*, so that the suit no longer pends?

3. Whether petitioner's right to amend the complaint without leave of court was terminated by entry of the final judgment against him.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST., Fifth Amendment:

> "No person shall be held etc., * * * nor be deprived of life, liberty, or property, without due process of law; * * *."

U. S. CONST., Fourteenth Amendment, § 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

PRELIMINARY STATEMENT

The purpose of the application for writ of certiorari is to have a review of *two judgments* of the United States Court of Appeals for the Third Circuit at Nos. 12764 and 12765. This brief is limited to defending the judgment at No. 12765, since the judgment at No. 12764 will be upheld by the Attorney General of Pennsylvania. When the words "this case" are used hereafter, the reference is to the case at No. 12765, wherein the only defendants

are Horace Stern, former chief justice of the Supreme Court of Pennsylvania, and Patrick N. Bolsinger, Prothonotary of that Court for the Western District.

STATEMENT OF THE CASE

This suit arose out of petitioner's unsuccessful effort, in 1954, to have the Supreme Court of Pennsylvania take disciplinary action against various individuals, to-wit: (1) a member of the bar of Allegheny County for alleged misconduct; (2) fifteen members of the Offence Committee who had dismissed petitioner's charges; (3) a judge of the Court of Common Pleas of Allegheny County who had dismissed petitioner's appeal from the committee's action; and (4) four individual members of the bar of the latter court.

The suit in the United States District Court for the Western District of Pennsylvania was originally lodged against Horace Stern, the then Chief Justice, and Patrick N. Bolsinger, the Prothonotary. It charged that by dismissal of the petition for disciplinary action without a hearing, followed by refusal to make the petition a matter of court record, the defendants had unlawfully denied plaintiff his rights and privileges under the Civil Rights Acts and under the Fifth and Fourteenth Amendments to the Federal Constitution.

The District Court dismissed the complaint because it failed to state a cause of action (125 F. Supp. 396). On appeal, the Court of Appeals affirmed on June 3, 1955, holding explicitly that the plaintiff "had not stated a cause of action cognizable in a U. S. District Court under the Civil Rights Acts now embodied in 42 USCA §§1983, 1985 and 1986 (1954 Supp.), or under

any other statute or rule of law." (225 F 2d 245) The order of affirmance allowed costs of $215.25 to the defendants. Before the mandate issued, the plaintiff asked the Court of Appeals for leave to amend his complaint. Such leave was denied on June 20, 1955, as was also plaintiff's petition for a rehearing. Leave to file a supplementary petition for rehearing was likewise denied on December 27, 1955.

On March 20, 1956, plaintiff moved the District Court for leave to file an amended complaint. The proposed amendment differed from the original complaint only in that it dropped the Prothonotary as a party defendant, named as defendants all of the justices of the Supreme Court, and charged that plaintiff had a legal right to prosecute his petition for disciplinary action and had been injured personally and professionally by its dismissal. The District Court refused to allow the amendment, but mistakenly entered a judgment in favor of the defendants and the other justices whom plaintiff was seeking to have joined as defendants (19 FRD 238). On appeal, the Court of Appeals on March 13, 1957 affirmed the denial of leave to file an amended complaint, but vacated the entry of judgment for all defendants, on the ground that the original judgment for the original defendants remained unchanged. It expressly characterized its first adjudication as a "final judgment" (242 F 2d 379, 381). Costs of $100.05 were taxed against the plaintiff.

From the judgments of the Court of Appeals in 1955 and 1957, plaintiff neither appealed to the Supreme Court of the United States nor asked for certiorari.

but allowed said judgments to become final. The proceeding has ever since remained a closed case.

In August 1958, a writ of attachment execution was issued by the defendants for collection of the costs previously assessed on the plaintiff by the Court of Appeals. Plaintiff then (a) moved to vacate the writ of attachment; (b) moved to vacate the 1956 order of the District Court refusing his motion for leave to file an amended complaint; and (c) gave notice of intention to take the deposition of Chief Justice Stern, for the alleged purpose of discovery and for use as evidence in the suit. After answers were filed by the defendants, and oral arguments offered by both parties, the District Court by separate orders denied plaintiff's motions and ordered that the proposed deposition should not be taken. Plaintiff incorrectly asserts that the District Court did not file an opinion. The fact is that at the conclusion of the argument and in plaintiff's presence, the hearing judge forthwith dictated his opinion into the record, and it is printed as an appendix to this brief.

From the three orders of the District Court, the plaintiff appealed. All were affirmed by the Court of Appeals in an opinion filed on February 17, 1959 (263 F 2d 458). A rehearing was denied on March 16, 1959. Thereupon the plaintiff filed the present petition for writ of certiorari, entitling the petition as though the additional justices actually had become party defendants, whereas leave to join them with the original defendants had been refused.

ARGUMENT

I. The "Rights" Which Petitioner Alleges Were Violated Are Not Rights Secured to Him by the Federal Constitution and Laws.

Matters relating to the practice of law in the state courts, like matters relating to the right to state office and other privileges granted by the state, do not involve any right guaranteed by the Federal Constitution, wherefore the denial of any such claimed right will not support a suit under the Civil Rights Act: *Snowden v. Hughes,* 88 L ed 497, 321 US 1 (1944); *Belva v. Lockwood,* 38 L ed 929, 154 US 116 (1894); *Bradwell v. Illinois,* 21 L ed 442, 83 US 130 (1873); *Mitchell v. Greenough,* 100 F 2d 184 (9th Cir. 1938); *Charters v. Shaffer,* 181 F 2d 764 (3d Cir. 1950); *Wall v. King,* 206 F 2d 878 (1st Cir. 1953); *McGuire v. Todd,* 198 F 2d 60 (5th Cir. 1952).

As a matter of state law, the Supreme Court of Pennsylvania has power not only to investigate and act upon charges of improper and unprofessional conduct, *Forman's Case,* 321 Pa. 47, 184 Atl. 75 (1936), but has power to make its own rules governing such matters: *In Re Disbarment Proceedings,* 321 Pa. 81, 184 Atl. 59 (1936). It has provided by rule a regular procedure for handling complaints against members of the bar,[1] which procedure was followed in petitioner's case.

---

1. Sub-paragraph (b) of Rule 17 creates "the Board of Governance of the Pennsylvania Bar," and sub-paragraph (d) provides:

> "Complaints against members of the bar of this Court alleging misconduct shall be made to the board; if made to the court, they *may* be forthwith certified to the board. *If the matter is of sufficient*

Quite evidently the Supreme Court did not consider petitioner's complaint of sufficient importance to necessitate further procedure, for it endorsed on the complaint:

"Petition dismissed. Per Curiam. June 28, 1954."

The *complainant* in a disciplinary proceeding has no right to a hearing on his complaint: *In Re Disbarment Proceedings,* supra (184 Atl. 59); *Critchfield v. Levy,* 265 Pa. 388, 109 Atl. 155 (1919); *Petition of Brack,* 187 Md. 407, 50 A. 2d 432 (1946), cert. den. 91 L ed 1846, 331 US 833. Whether the complaint should be proceeded with or dismissed is solely for the judgment of the court. The complainant is simply an informer, and as such he has no *right* to be heard at any stage of the proceeding, save as the court or its committee may call upon him to testify. Like any other witness, the outcome of the proceeding will not affect him or his rights in any way.

The Court of Appeals has twice held that a remediable cause of action was not laid in the complaint. Since the ruling is clearly correct, it furnishes a complete answer to the request for certiorari.

II. Whether the Complaint States a Good Cause of Action Is RES JUDICATA, and the Suit No Longer Pends.

In the first instance, the District Court dismissed the complaint for failure to state a remediable cause of

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importance to require further investigation, the complainant shall be directed to file a formal petition in paragraph form, setting forth the charges against the respondent. If the petition is sufficient, the respondent shall be required to file an answer, * * * * " (Emphasis supplied.)

action. On appeal, the judgment was affirmed solely on the same ground. The plaintiff might then have brought the case to this Honorable Court, by appeal or petition for certiorari, but he did not and hence the judgment against him became a final judgment.

That should have ended the litigation, but plaintiff was persistent and not only asked the Court of Appeals for leave to amend, which was refused, but a year later made the same request of the District Court. This latter request was refused, and on appeal the Court of Appeals again affirmed: 242 F 2d 379. Once more the plaintiff might have appealed or asked for certiorari, but he did nothing.

The result of all this maneuvering is that there has been a final, conclusive judgment of record against the plaintiff since June 3, 1955, under which the complaint was dismissed. That judgment contains every essential element of *res judicata*,[2] and forever bars plaintiff from again asserting the same cause of action.

"A claim or demand which is put in suit and passes to final judgment is merged or swallowed up in the judgment; * * *. The judgment extinguishes the original cause of action, which loses its vitality and cannot thereafter be litigated, either as a cause of action or as a set-off or counterclaim * * *." 50 C.J.S. 599. "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties

---

2. The elements are identity of parties, subject-matter, and cause of action: *De Met's Inc. v. Insull*, 122 F 2d 755 (7th Cir. 1941), cert. den. 86 L ed 1205, 315 U S 806; *June v. George C. Peterson Co.*, 155 F 2d 963, 965 (8th Cir. 1942).

upon any ground whatever, absent fraud or some other factor invalidating the judgment": *Commissioner v. Sunnen*, 92 L ed 898, 906, 333 US 591, 597. See also *U. S. v. Moser*, 69 L ed 262, 264, 266 US 236, 241; *Carpenter v. Erie R. Co.*, 178 F 2d 921 (2d Cir. 1949), cert. den. 94 L ed 1338, 339 US 912.

A final judgment operates as *res judicata* and as a bar to relitigation of the controversy, and the cause of action merges in the judgment, where the time to appeal has expired without an appeal being taken: *U. S. v. Munsingwear*, 95 L ed 36, 40, 340 US 36, 38. This is so even though the judgment was entered on the sustaining of a demurrer: *Liken v. Shaffer*, 64 F. Supp. 432, 445 (D. C. Iowa, 1946).

In his instant effort to have vacated the 1956 order of court which refused his motion for leave to amend, plaintiff has not even submitted the form of complaint he would file if permission were granted. It may be presumed he would offer the same amended complaint as he sought to file in 1956, and which the Court of Appeals had described in these words (242 F 2d 379, 380):

> "An examination of the proposed amended complaint sought to be filed by Ginsburg in the court below * * * discloses no new ground for the relief sought by him."

Plainly *res judicata* is a bar to the plaintiff's endeavor to reopen a case in which the very question now raised was long ago decided against him.

The basis of plaintiff's claim to renew the litigation by amending his complaint and so to escape payment of costs is his mistaken supposition that the issues which

were involved in the action "have not yet been finally determined" and that the suit is currently pending. Actually, the suit no longer pends, for the District Court dismissed it in October 1954, and its ruling was expressly affirmed by the Court of Appeals, with costs to the defendants. That adjudication has never been reversed, vacated or modified. As the Court of Appeals said in a subsequent opinion, its adjudication of plaintiff's first appeal was *a final* judgment (242 F 2d 379). In consequence, such final judgment spelled *finis* to the suit, and it no longer pends.

Absent a pending suit, to require a deposition to be given by Judge Stern would be to compel the doing of a vain and fruitless thing. Moreover, the finality of the judgment in the case made the costs imposed on plaintiff payable forthwith, and issuance of an attachment for their collection was in no wise premature.

III. Petitioner's Right to Amend His Complaint As of Course Was Terminated by Entry of the Final Judgment Against Him.

Petitioner claimed below, and now reiterates, that Rule 15 (a) gave him the right, as a matter of course and without leave of court, to amend his complaint once before a responsive pleading was served upon him. On the contrary, it is well settled that the right to amend as a matter of course under Rule 15 (a) terminates at the entry of judgment: *Kelly v. Delaware River Joint Commission,* 187 F 2d 93 (3d. Cir. 1951); *Feddersen Motors v. Ward,* 180 F 2d 519 (10th Cir. 1950); *Keene Lumber Co. v. Levinthal,* 165 F 2d 815 (1st Cir. 1948). Thereafter amendment may be permitted only at the dis-

cretion of the court upon appropriate application under Rule 59 (b) and (e) or Rule 60 (b): *Kelly v. Delaware River Joint Commission,* supra; *Keene Lumber Co. v. Levinthal,* supra; *Knox v. First Security Bank of Utah,* 206 F 2d 823 (10th Cir. 1953). Here, petitioner did not bring his application under any of the rules cited.

Moreover, the Court of Appeals in 1955 denied plaintiff's motion to amend (225 F 2d 245); the District Court twice, in 1956 and 1958, refused leave to amend the complaint; and the Court of Appeals twice affirmed such judgment of the District Court. Since manifestly the proposed amendments did not set forth a good cause of action, neither court abused its discretion in refusing permission to file them.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1959.

REED, SMITH, SHAW & MCCLAY
Pittsburgh, Pennsylvania
Of Counsel

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PAUL GINSBURG, Appellant
v.
HORACE STERN et al.

Civil Action
No. 12,643

Unpublished Oral Opinion of the Court

The Court (Gourley, C. J.):—

. . . The Court will state its opinion for the record. . . . This proceeding has been pending in this Court since August 31, 1954. There have been divers hearings before this Court and the United States Court of Appeals for the Third Circuit relative to whether as a matter of law, this plaintiff has the right to institute action against one or more members of the Supreme Court of the Commonwealth of Pennsylvania and the then acting prothonotary of said court.

After a hearing before the United States Court of Appeals for the Third Circuit which affirmed the judgment of this Court, a mandate was issued by the appellate court under the seal of the clerk as set forth to this Court dated June 2nd, 1955, and the mandate reads inter alios as follows:

"It is here ordered adjudged by this Court that the judgment of the District Court be and the same is hereby is affirmed with the costs. Said costs to be recovered by appellees Horace Stern and Patrick N. Bolsinger. Amount of costs is taxed $215.25."

Subsequent to that date, other matters were presented to the District Court which again resulted in an appeal being had to the United States Court of Appeals for the Third Circiut and it appears from a mandate issued under the seal of said Court signed by the clerk of the appellate court, said mandate provided inter alia, "The order of the Court of July 19, 1956"—that's referring to the District Court "denying the plaintiffs leave to file an amended complaint be and the same is hereby affirmed, and costs to be recovered by Horace Stern, et al, appellants," which as I read the mandate, made reference to Patrick N. Bolsinger as the et al individual, the amount of said costs being $100.05.

On August 13, 1958, counsel for the defendants presented to the Court a praecipe in the nature of a motion, a praecipe and motion for writ of attachment execution relative to the costs which I heretofore made reference to, the total amount of said costs in the two appeal mandates being $315.30.

The Court issued an order on August 13, 1958,—this Court did—directing the Mellon National Bank and Trust Company, garnishee, to appear on or before September 10th, 1958, to show cause why the defendant's judgment for costs shall not be levied on the effects of the plaintiff's in its hands. It has been stated to the Court during the extended argument that the amount of the costs are not being questioned, although the question is being raised as to the authority of the United States Court of Appeals to direct the payment of said costs by the plaintiff.

After the issuance of the attachment, arrangements were made between the bank and the plaintiff whereby

until the disposition of the matters now before this Court, the amount of $500 was to be set aside from the plaintiff's account and held in the nature of an escrow fund by the Mellon Bank until the determination of the matters before this Court which I have heard this date.

After the issuance of the writ of attachment on August 13, 1958, the plaintiff, Paul Ginsburg, filed with the Court a motion to vacate the writ of attachment execution and to dissolve the attachment. It is claimed that the United States Court of Appeals for the Third Circuit had no authority in law to direct the payment of the costs in the matters heard by that Court. Assuming, but not admitting that the cost is proper, if the appellate court did have the authority to direct the payment of the costs since the civil action has remained open in this Court and that under the provisions of the Judicial Code, to wit, 28 U.S.C.A., 1651, which reads inter alia as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the useage and principles of law," the matter remains open as a civil action for the reason that the plaintiff has the right in law to go before the Supreme Court of the United States requesting the issuance of writs which the plaintiff feels would be justified in aid of the relief which he asks. As a result of the provision of the Judicial Code which I just read and without any consideration to the motion which is also pending before this court to permit the filing of an amended complaint, the civil action remains open, there is not a final judgment and due to the reasons just stated. the motion which the plaintiff filed to vacate the writ

of attachment execution and to dissolve the attachment should be granted.

Contemporaneous with the filing of the motion just made reference to the plaintiff also filed a motion to vacate the order refusing the motion for leave to file amended complaint and for other relief. In this motion the plaintiff claims that the United States Court of Appeals for the Third Circuit had no authority to enter any order denying the right of the plaintiff to file an amended complaint and that since the United States Court of Appeals for the Third Circuit exceeded its authority and in view of the fact that the United States Court of Appeals for the Third Circuit in its affirmation of this Court's decision did not sustain or affirm this Court for the same reasons that the District Court denied the motion to dismiss, that this Court has authority in law to permit the filing of the amended complaint and for all practical intents and purposes to reverse the decision of the United States Court of Appeals for the Third Circuit.

Each of the motions to which I have just made reference was filed in this Court on August 26, 1958 and answers to each of the motions have been filed by the defendants.

In addition to the motion just made reference to, the plaintiff served notice on Horace Stern that it was desired to take the deposition of Horace Stern for the purpose of discovery and to be used as evidence in connection with preparing for trial argument or hearing the motion that had been filed by the plaintiff for leave to file the amended complaint.

The Court is of the following opinion and judgment in connection with each of the motions: It is not the province, authority or jurisdiction of the United States District Court to consider the wisdom, the reasons, the attitude or the justification for a decision entered by a United States Court of Appeals. I have no such jurisdiction, I have no such authority and I would not criticize or engage in any inquiry as to why an appellate court would reach a conclusion as written or as ordered.

It is my best judgment reading the mandates issued by the appellate court, that the judgments entered by the Court relative to costs are final orders. I know nothing of the reasons for their conclusions, I am not questioning it, I have no authority to question it and therefore the mandates issued by the Court in connection with the two appeals in which it was directed that the costs be paid by the plaintiff are valid subsisting legal orders. The costs have not been paid. There was nothing pending before this Court in any way whatsoever at the time the writ of attachment was executed and therefore, the writ of attachment is proper and will not be disturbed.

Contemporaneously with the filing of the motion to vacate writ of attachment was filed a motion to vacate an order which this Court has entered and which was affirmed by the appellate court which denied the plaintiff leave to file an amended complaint. That motion must be refused. I have no authority to permit it to be granted and therefore the motion to vacate the order entered by this Court heretofore which refused the right of the plaintiff to file an amended complaint is denied.

Since there is nothing in any way whatsoever pending before this Court or any other court as I review the

record and pleading, with due deference to plaintiff's position, there is no basis to permit the taking of the deposition of Horace Stern and/or Patrick N. Bolsinger and therefore, the motion of the defendant to restrain the taking of the deposition of Horace Stern and I will also substitute Patrick N. Bolsinger, is granted. A written order will be entered refusing each of the motions as I have orally expressed for the record. The reporter is directed to transcribe this record at the joint expense of the parties in full and complete as stated by counsel and the Court and have the same available for any appellate court who might have occasion to consider the problems here presented.

IN THE

Supreme Court of the United States

October Term, 1958
No. 1003

PAUL GINSBURG,
Petitioner

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly, as Justices of the Supreme Court of Pennsylvania

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1958
No. 1003

Paul Ginsburg, Petitioner
v.
Horace Stern, Allen M. Stearne, Charles Alvin Jones, John C. Bell, Jr., Thomas McKeen Chidsey, Michael A. Musmanno and John C. Arnold, Individually and Jointly as Justices of the Supreme Court of Pennsylvania

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania is unreported. The opinion of the United States Court of Appeals for the Third Circuit is reported at 263 F. 2d 457.

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on February 17, 1959. Rehearing was denied on March 16, 1959.

QUESTIONS PRESENTED

1. Does a United States District Court have power to vacate its order dismissing a complaint after such order has been affirmed on appeal to the United States Court of Appeals for the proper circuit and the mandate of the Court of Appeals has been issued to the District Court where the party seeking vacation of such order asserts no new ground for relief?

2. Assuming a District Court has the power to vacate its order dismissing a complaint after the order has been affirmed on appeal and the mandate of the Court of Appeals has been issued, would such action be justified where the only reason asserted in support of such action is that the Court of Appeals affirmed the original order of dismissal for a reason in law different from that of the District Court?

STATEMENT OF THE CASE

This brief in opposition is limited to the application for a petition for a writ of certiorari seeking review of the judgment of the Court of Appeals at No. 12764. Defendants-respondents in that proceeding are, as set forth on the cover of the present petition, the seven judges of the Supreme Court of Pennsylvania at the time the complaint was filed. Their counsel has been and is the Attorney General of Pennsylvania. The facts and history of the case are as set forth below. None of these matters are the same as those pertaining to the judgment of the Court of Appeals at No. 12765, a judgment of which petitioner is also seeking review in the present petition.

On February 2, 1956, petitioner filed his complaint in the United States District Court for the Western District of Pennsylvania. He alleged therein that respondents, the then seven judges of the Supreme Court of Pennsylvania, in the course of their official duties had deprived him of rights guaranteed him by the Constitution and statutes of the United States. Respondents and petitioner filed several motions, including a Motion To Dismiss by respondents. Following argument thereon, the District Court, on December 18, 1956, granted respondents' Motion To Dismiss on the ground that judges acting in their official capacity were immune from suit. 148 F. Supp. 663.

Petitioner appealed from this order to the United States Court of Appeals for the Third Circuit. His

initial Motion To Remand was denied on April 17, 1957; and the order of the District Court was affirmed, after argument on the appeal, on January 3, 1958. The Court of Appeals affirmed because, as it stated, petitioner's complaint "does not show that he has been denied any rights, privileges or immunities secured by the Constitution and the laws of the United States." 251 F. 2d 49, 50. It thus deemed unnecessary a determination of the judicial immunity question on which the District Court based its decision.

Petition for Rehearing was denied on February 4, 1958. These appeal proceedings are found at No. 12165 in the Court of Appeals.

Petitioner then filed a Petition for a Writ of Certiorari with this Court. The Petition was denied on April 14, 1958, 356 U.S. 932; and the mandate of the Court of Appeals was issued to the District Court on April 21, 1958. A timely Petition for Rehearing was denied on May 5, 1958, 356 U.S. 954. Petitioner's Motion To Remand was denied on June 23, 1958. 357 U.S. 924. These proceedings were docketed at No. 834 October Term, 1957.

On the same date, June 23, 1958, petitioner filed with the District Court a Motion To Vacate Order Dismissing Complaint and for Other Relief. His reason in support of this Motion was that the Court of Appeals, in affirming the dismissal for a reason different from that announced by the District Court, had acted beyond its powers and that this Court's denial of his petition for a writ of certiorari under the circumstances affirmed this lack of power. Petitioner's Motion was denied without opinion, in an unreported order, on September 16, 1958. Civil Action No. 14240.

Petitioner then appealed from this denial of his Motion to the Court of Appeals which affirmed *per curiam* on February 17, 1959. A Petition for Rehearing was denied on March 16, 1959.

ARGUMENT

The decision of the Court of Appeals was clearly correct and raises no conflict with any decision by any other Court of Appeals or by this Court. The sole issue presented to the Court of Appeals was the correctness of the District Court's denial of Petitioner's Motion To Vacate its order dismissing his complaint. The Court of Appeals properly relied on its earlier decision in *Butcher & Sherrerd v. Welsh*, 206 F. 2d 259, in which it stated:

> "Where a judgment has been affirmed on appeal and the mandate handed down it is beyond the power of the lower court to disturb the judgment without leave of the appellate court."
> 206 F. 2d 259, 262.

The Court of Appeals in that opinion also pointed out that Rule 60(b) of the Federal Rules of Civil Procedure does not confer upon a District Court the power to alter or amend a judgment which has been affirmed on appeal.

In a later case, *Ginsburg v. Stern*, 242 F. 2d 379, the Court of Appeals indicated that its ruling in *Butcher & Sherrerd* might not apply to a case where the relief requested of the District Court is based on new grounds which were not and "perhaps could not" have been presented to the appellate court at the time of a previous appeal. 242 F. 2d 379, 381. A similar indication appears from the opinion of the Court of Appeals for the 2nd Circuit in *In the Matter of Long Island*

Lighting Company, 244 F. 2d 499; cert. denied, 355 U.S. 820.

Petitioner in the present case, however, has presented no new grounds for relief. Somehow, he has concluded that because the Court of Appeals affirmed the original order dismissing the complaint on a legal basis different from that of the District Court (i.e. on the ground that the complaint failed to show a deprivation of any federally-protected rights, privileges or immunities rather than on the ground that judges are immune from liability for their official acts), the Court of Appeals acted improperly. In fact, he goes so far as to state in the present petition (p. 20) that the Court of Appeals thus "reversed" the District Court on the immunity issue, despite the former court's express disclaimer that it in any way was passing on the immunity question. 251 F. 2d 49, 50.

Petitioner completely overlooks the elementary doctrine that an appellate court may affirm a decision on the record presented to it (here, a complaint and motion to dismiss) without agreeing with the lower court's reasoning. No more than that appears in this case.

The many questions sought to be raised by petitioner here are no different in substance from those he sought to raise in his previous petition at No. 834 October Term, 1957. None of them are now properly raised since they were properly before neither the District Court nor the Court of Appeals. The question of the sufficiency of the complaint has been adjudicated finally and not reopened. The interesting question of judicial immunity is not involved. All

that is properly before this Court are the questions stated at the outset of this brief, and these have been decided correctly by the Court of Appeals.

CONCLUSION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

HARRY J. RUBIN,
Deputy Attorney General,
ANNE X. ALPERN,
Attorney General,
Attorneys for Defendants.

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Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 118

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania.

PETITIONER'S REPLY BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 118

PAUL GINSBURG, Petitioner

v.

HORACE STERN, ALLEN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO and JOHN C. ARNOLD, Individually and Jointly as Justices of the Supreme Court of Pennsylvania.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

A. The "Brief for Respondent in Opposition to Petition for Writ of Certiorari" presented by the Attorney General of Pennsylvania fails to comply, and could not comply, with paragraph 1 of Rule 24 because it does not disclose "any matter or ground why the cause should not be reviewed by this Court".

Because the respondents represented therein claim (p. 7), "The interesting question of judicial immunity is not involved"; they necessarily admit that they do not have immunity. Furthermore, they failed to cite and could not cite any applicable authorities in opposition to the many authorities cited by your petitioner (pp. 14-15), all of which leave no doubt about the lack of immunity.

It is important to call the Court's attention to this point, because the only "defense" raised by their motion to dismiss in the District Court was immunity, the only issue adjudicated therein.

Thus they now completely rely upon the inapplicable, if existent, "principle" stated in the case of *Butcher & Sherrerd v. Welsh,* 206 F. 2d 259, etc., which the Court of Appeals was so ready, able and willing to misapply, so that said court could continue its expressly refraining from adjudicating the issue of immunity,—the only issue herein properly before that court. The inapplicability herein of *Butcher & Sherrerd v. Welsh* is adequately shown in Reason G for Allowance of the Writ (pp. 18-20).

Judging from numerous Records in the Court of Appeals, that court's biggest problem respecting your petitioner appears to be that the bigoted, prejudiced Circuit Judge William Henry Hastie would not consider a decision allowing your petitioner his federal constituional and civil rights; and the other Circuit Judges would not dare make a decision interfering with the federal constitutional and civil rights of Judge Hastie's constituents. Therefore, your petitioner must remain a victim of their joint suspended indecision,—unless this Honorable Court will come to his rescue by making the decisions which the Court of Appeals should have made at the outset.

B. The brief in opposition presented by Attorney Elder W. Marshall fails to comply, and could not comply, with paragraph 1 of Rule 24 because it does not disclose "any m 'ter or ground why the cause should not be review this Court". Contrarily, it dwells mostly upon

State questions which are not involved herein, instead of upon the Federal questions which are involved herein and which make this a cause of public importance.

Your petitioner tried to explain that error of Attorney Marshall's ways to him in italics in the petition (p. 6), in order to avoid the anticipated repetition of it. Nevertheless, Attorney Marshall misrepresented the Amended Complaint as though your petitioner were taking an appeal to the District Court from the Pennsylvania Supreme Court instead of suing in the District Court for deprivations of Federal rights perpetrated in the Pennsylvania Supreme Court.

Elder W. Marshall, Esquire, overlooked or misapprehended, as did the Court of Appeals, the following pertinent allegations of the Amended Complaint (R. 11a in appeal No. 12,052), admitted to be true for purposes herein:

"12. Defendants by their said conspiratorial actions have unlawfully discriminated against plaintiff, and have deprived plaintiff of the exercise of his rights and privileges as a citizen of the United States.

"13. The said combined, conspiratorial actions of the defendants deprived plaintiff of important rights under the Constitution and laws of the United States, particularly his right to due process of law which assures him his right to a day in court; and his right to the protection of the Civil Rights Acts. Defendants by their thus impeding, hindering, obstructing and defeating the due course of justice, did unlawfully deprive plaintiff of his rights thereunto appertaining.

"14. By reason of the said combined and conspiratorial actions and agreements of defendants as afore-

said, plaintiff has been injured in his right to earn a living and in his professional standing in the Court of Common Pleas of Allegheny County, Pennsylvania and in the Supreme Court of Pennsylvania; and has suffered loss of prestige and good will, and has been damaged personally and professionally."

It is respectfully submitted that no matter what Attorney Marshall argues or what the Court of Appeals opines, not a word of petitioner's pleadings can be changed thereby; nor can the Federal Rules of Civil Procedure thus be changed, or the Law of the Land.

Because the Order of the District Court denying the motion for leave to file the Amended Complaint was based solely on an erroneous view of the law of immunity, and not in the exercise of discretion, it should be reversed. Further the discretion, if any, of the District Court was not reviewable except on the issue of immunity.

When it was held at the outset that Bolsinger should not be a defendant because he would be fired if he did not take all such Orders from Chief Justice Horace Stern no matter how "violative of basic concepts of justice", your petitioner agreed with that as a "finding of fact" but disagreed with it as a "conclusion of law." Accordingly, in the Amended Complaint, when adding the Associate Justices of the State Court as defendants, Bolsinger was dropped as a defendant. Nevertheless, his Attorney Marshall does him the disservice of maintaining him as a defendant-respondent.

Replying to respondents' impertinent **Argument I** (pp. 6-7), it is refuted that the right to practice law is merely a privilege. It is elementary that it is a privilege to become admitted to the Bar, but that upon admission, the applicant becomes vested with a right to practice law,—a federally secured right. See points and authorities in the petition (pp. 13-14), any discussion of which or opposition thereto was so studiously avoided by the respondents.

An examination of the (erroneously impounded) Petition presented to the Pennsylvania Supreme Court at No. . . . Miscellaneous Docket, In Re: Louis Caplan, et al., Members of the Bar, will disclose that your petitioner followed all Rules of Court and Rules of Procedure, including the footnoted (pp. 6-7) Rule 17(d), cited by respondents. It was the actions of respondents in connection therewith that were characterized by Chief District Judge Gourley as being "violative of basic concepts of justice".

Counsel's labeling the complainant (petitioner) in a disciplinary proceeding as "simply an informer" is an impudent misrepresentation of the Office of Attorney and a violation of the Canons of Professional Ethics. Actually, such a complainant is exercising the rights and duties of members of the bar:—

In *People ex rel. Colorado Bar Ass'n. v. Class,* 201 P. 883, 70 Colo. 381, (1921) the Court held, p. 884:

> "It is the privilege, if not the duty, of every attorney to call to the attention of this Court any act of a licensed attorney which may fairly be considered to disqualify him. Calling attention to

breaches of professional duty should be encouraged, rather than denounced, and it is only by the exercise of constant vigilance on the part of the members of the bar that the profession may be kept up to that high standard which should characterize it."

In *State ex rel. Fletcher v. Hunter et al.*, 276 S.W. 639, 152 Tenn. 233 (1925), the Court held, p. 640:

"Each individual member of any local bar, in the same sense as any group of members of a bar acting as a committee, or association, is 'aggrieved' by the professional misconduct of any other member of his bar. Such misconduct reflects upon and shadows the standing of the bar and profession as a whole, and impairs the standing and usefulness of the profession and of all its members. These are matters in the realm of ethics, and hard and fast rules applicable to tangible rights and wrongs do not apply. One may be 'aggrieved' in the sense contemplated by this statute without having suffered a direct individual injury. It is sufficient that he is a member of a class in this case a profession, whose standing before the public, which should be zealously guarded, has been adversely affected, and which has been, therefore, 'aggrieved'."

Replying to respondents' erroneous **Argument II** (pp. 7-10), it exhibits (p. 8) an unawareness of when an action is ripe for certiorari as well as a lack of knowledge that there is no prescribed time within which to proceed under the All Writs Act. Furthermore, the asseveration that there has been a conclusive judgment herein since June 3, 1955, contradicts the agreement entered into long after that date between your petitioner and Attorney Elder W. Marshall (Petition, p. 10) "to

await the determination of the other case referred to in section A of this Statement". Attorney Marshall denied this agreement in his Brief for Appellees in the Court of Appeals at No. 12,765; and consequently your petitioner, in his Reply Brief for Appellant therein, printed copies of correspondence between him and Attorney Marshall which established the said agreement.

Counsel's arguing on the point of *res judicata* is insupportable and untenable. Even if he were correct in his position thereon, that could never help him establish his impossible burden of convincing this Honorable Court that this "suit no longer pends". Therefore, the lower courts were not justified in allowing his attachment execution on your petitioner's bank accounts for costs herein.

Replying to respondents' unsupported **Argument III** (pp. 10-11) their citations are not authority for the propositions and the propositions contain no legal opposition to the petition for writ of certiorari. No matter how the respondents try to twist the record facts and turn the applicable Rules, there can be no question that Rule 15 (a) applies. Reason E for Allowance of the Writ (p. 17) contains the unopposed authorities. Even the Court of Appeals tired of the cases cited by respondents, and relied solely in its Opinion (App. 3-5) upon the one inapplicable case of *Butcher & Sherrerd v. Welsh*.

Consideration of the proceedings and appendices in the instant appeal at No. 12,765 as well as the prior appeals at Nos. 11,499 and 12,052 which are embraced thereby, should convince this Honorable Court of the need for review herein.

The said respondents have unnecessarily appended (12-17) what they themselves label an "Unpublished Oral Opinion of the Court". This so termed "Unpublished Oral Opinion of the Court" amounts to nothing more than an excerpt from the Transcript of Official Notes of Proceedings. Aside from the point that it does not qualify as an Appendix, it was previously printed unnecessarily by these respondents for "use" of the Court of Appeals as an Appendix to their Brief therein; and, therefore, it has already been filed herein as experienced practitioners would know and as counsel has been notified by your petitioner. When this Honorable Court reads it, the Court can evaluate it for what it is worth.

ADDENDA

In both actions involved in this petition, trial by jury was demanded. The orders entered by the lower courts unlawfully deprived your petitioner of his right to trial by jury. This deprivation should be corrected in the light of this Court's recent decision (May 25, 1959) in the case of *Beacon Theatres, Inc., v. Hon. Harry C. Westover,* 78 S. Ct. 948. Mr. Justice Black, who delivered the Opinion of the Court, stated, pp. 951-2, "Petitioner, Beacon Theatres, Inc., sought by mandamus to require a district judge in the Southern District of California to vacate certain orders alleged to deprive it of a jury trial of issues arising in a suit brought against it by Fox West Coast Theatres, Inc. The Court of Appeals for the Ninth Circuit refused the writ, holding that the trial judge had acted within his proper discretion in denying petitioner's request for a jury. 252 F. 2d 864. We granted certiorari; 356 U.S. 956, 78 S. Ct. 996, 2 L.

Ed. 2d 1064, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care'. *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S. Ct. 296, 301, 79 L. Ed. 603." In reversing the Court of Appeals, Mr. Justice Black concluded (p. 957), "Respondent claims mandamus is not available under the All Writs Act., 28 U. S. C. sec. 1651, 28 U. S. C. A. sec. 1651. Whatever difference of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled".

CONCLUSION

The weaknesses in the briefs filed on behalf of the respondents emphasize the strength and accentuate the merit of the Petition. Actually, the respondents' briefs evade the petitioner's Reasons for Allowance of the Writs, and fail to disclose any legal opposition. Therefore, the petition for writs of certiorari should be granted.

Respectfully submitted,

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Dated: 25 August 1959.

ILE COPY

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 118

PAUL GINSBURG, Petitioner

v.

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PETITION FOR REHEARING

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for rehearing of Paul Ginsburg respectfully represents:

FIRST: On October 12, 1959, this Honorable Court denied the petition for writ of certiorari in the above captioned actions. The petition showed that the judgments sought to be reviewed conflicted with the Law of the Land in adjudicating that:

(A) On a Motion to Dismiss, the allegations of the Complaint need not be taken as admitted to be true, and all inferences therefrom need not be construed most favorably towards the plaintiff's case.

(B) Courts no longer must recognize Notice Pleadings in Federal Practice, contrarily to Rule 8(a) of the Federal Rules of Civil Procedure.

(C) The petitioner has no federal constitutional and civil rights.

(D) The respondents as members of the State judiciary acting in their official capacity are immune from suits for deprivations of Federal constitutional and civil rights.

(E) The plaintiff no longer has the right to discovery which is guaranteed by Rule 26(a) of the Federal Rules of Civil Procedure.

(F) The affirmative defense of immunity not pleaded under Rule 8(c) of the Federal Rules of Civil Procedure, is no longer waived pursuant to Rule 12(h).

(G) The "right" under Rule 15(a) to amend once as a matter of course, without leave of court or consent of defendants, at any time prior to service of a responsive pleading, can be ignored.

(H) District Court Judges are no longer bound by the Federal Rules of Civil Procedure as by an Act of Congress.

(I) The right to amend freely to secure a determination on merits rather than on technicalities, can be denied discriminatorily without review.

(J) An Exhibit to a Complaint which is relevant, material, pertinent thereto and free of scandalous matter, can be suppressed and impounded whimsically and capriciously without a Hearing.

(K) A mandate from the Court of Appeals is controlling as to all matters and not only to such matters as are within the compass of the mandate, with the un-

lawful result that the District Court is not still free to act as to questions not within the compass of the mandate. Therefore, a mere mandate now can delimit, disaffect or change the powers and duties of District Court Judges.

(L) When an action is actually pending pursuant to the Federal Rules of Civil Procedure after issuance of a mandate, it is not really pending, and, therefore, the party who succeeded in procuring the mandate can "legally" execute for costs upon the property of the adversary who is naive enough to rely upon the Rules and the applicable law, on the preposterous theory that the pending action is not pending.

(M) The jurisdiction of the Court of Appeals is no longer exclusively appellate; and it now can assume the powers and function of the District Court.

(N) An action can volley back and forth between the District Court and the Court of Appeals without a single legal adjudication on procedural and substantive issues that are properly before the Courts. Therefore, a plaintiff can be deprived of his right to a first chance in the District Court and a second chance in the Court of Appeals, and upon denial of certiorari in the Supreme Court, he has litigated "legally" throughout the Federal System without ever having had a chance (with undue process of law).

(O) In view of the foregoing, the petitioner has only been afforded the right to spend a lot of precious time and money for non-profit recordings, to be left merely with the right to criticize; and is apprehensive that even such remnants of rights might likewise be lost to petitioner upon discovery.

(P) It was respectfully submitted that such actions below called for an exercise of this Honorable Court's supervisory power over the lower courts, but to no avail.

SECOND: Petitioner's Reply Brief showed that the respondents' briefs in opposition to the Petition failed to comply with paragraph 1 of Rule 24 of this Court because they did not disclose "any matter or ground why the cause should not be reviewed by this Court".

THIRD: In rendering the decisions and decrees below, the Judges did not fully comply with the Canons of Judicial Ethics. There is a grave doubt about violations of Canon 1, Relations of the Judiciary; Canon 2, The Public Interest; Canon 3, Constitutional Obligations; Canon 5, Essential Conduct; Cannon 6, Industry; Canon 14, Independence; Canon 19, Judicial Opinions; Canon 20, Influence of Decisions upon the Development of the Law; Canon 22, Review; and Canon 34, A Summary of Judicial Obligation.

FOURTH: This Honorable Court's attention is particularly directed to Canon 20, Influence of Decisions upon the Development of the Law, because of the confusion and frustration caused and to be caused by the decisions in the instant cases. The Northern mandate of this Honorable Court in *Cooper et al., v. Aaron, et al.*, 358 U. S. 1 (1958), was challenged, attacked, repudiated and even reversed by Southern Judges who were informed of the decisions herein. The attempts of the Attorney General of the United States from the North to enforce and protect the right to vote for some Negroes of the South were attacked, defeated and even ridiculed by State officialdom, cognizant of the decisions herein.

FIFTH: This denial of certiorari gives support to the popular misconception that the only Civil Rights are

the right to attend an integrated school and the right to vote. According to the Law of the Land, there are numerous other civil rights authoritatively enumerated in the Petition, which are supposedly legally common to both Whites and Negroes, and of which your petitioner has been discriminatorily deprived. It is apparent from the Record that some Negro Judges in the North deprive White citizens of their civil rights.

SIXTH: Promptly after President Eisenhower was notified of the decisions in the instant cases, he discarded the Civil Rights issue and withdrew his activity from the cause. Being then fully informed and seeing that just as some White Judges in the South deprive some Negroes of their civil rights, some Negro Judges in the North deprive some Whites of their civil rights, the President must have concluded that the civil rights issue degenerated into politics as usual. It was then that the President abandoned it, with the attitude of "A plague on both your houses". For this the President of the United States of America was unduly subjected to severe criticism by the National Association for the Advancement of Colored People.

SEVENTH: In arriving at the decisions sought to be reviewed, the Judges of the Court of Appeals in effect permitted District Court Judges to reverse that Court's Judgment in *Picking v. Pa. R. Co.*, 151 F.2d 240 (1945), and in other cases; and even Chief Judge John Biggs, Jr., who wrote the Opinion in *Picking*, so submitted. Could it not be likewise implied from this denial of certiorari, that the lower Courts have done the same to this Court's pronouncements in *Cooper v. Aaron, supra?*

EIGHTH: Because of the conflicts involved, your petitioner is justified in arguing that the disintegrated Mason-Dixon Line has been replaced by an obverse one. Just as Dred Scott had to flee to safety above that old Line for protection, is "Dread" Ginsburg now obliged to descend to security below the new one in search of enforcement?

NINTH: Neither a complainant nor his counsel wants to sue public officials if they are immune from suit. However, if the officials are not immune, suits against them should proceed with due process of law. Therefore, this Honorable Court should grant certiorari herein and deliver an Opinion which would clarify all of the rights and liabilities involved. As a matter of simple justice, this is required by the peoples' "Right to Know".

Wherefore, your petitioner prays that this Honorable Court grant a rehearing, if for no other reason than to obviate an avalanche of Petitions for Rehearing out of time in other proceedings, which would be justifiable upon denial of certiorari herein.

PAUL GINSBURG,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.